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In The
Supreme Court of the United States

FRANK RICCI, ET AL.,
Petitioners,
v.
JOHN DESTEFANO, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE*, INTERNATIONAL ASSOCIATION OF BLACK PROFESSIONAL FIRE FIGHTERS, BLACK CHIEF OFFICERS COMMITTEE, JAMES CLACK, ROCCO FORTE, SHERMAN GEORGE, NED PETTUS, PAUL STUBBS, ROBERT WRIGHT, KYLE BRINK, Ph.D., JEFFREY CRENSHAW, Ph.D., and BRIAN BELLINGER, Ph.D., IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether respondents' failure to certify the results of promotional examinations violated the disparate-treatment provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).

2. Whether respondents' failure to certify the results of promotional examinations violated 42 U.S.C. § 2000e-2(l), which makes it unlawful for employers "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race."

3. Whether respondents' failure to certify the results of promotional examinations violated the Equal Protection Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 4

ARGUMENT 8

THERE IS A COMPELLING STATE INTEREST IN PROMOTING AND PRESERVING DIVERSITY IN OUR NATION'S FIRE SERVICE 8

1. Diversity Is Necessary for Adequate Community Service, Cohesiveness and Command in the Fire Services 12

2. The Examinations at Issue Did Not Realistically Test for "Merit" in Fire Command Scenarios. 17

3. The Impediment of "Tradition" in the Fire Service 23

4. A Future Jeopardized: Impending Black Retirements and Diminishment of Black Diversity in Fire Service and First Response 25

NEW HAVEN'S RESPONSE TO THE EXAMS' ADVERSE IMPACT WAS NARROWLY TAILORED 30

1. There Was No Racial Classification or Discriminatory Intent in New Haven's Decision Not to Certify the Examinations 30

2. Narrow-tailoring Applies in this Circumstance 31

a. Law-abiding cities cannot be forced into a Catch-22 between constitutional duties 31

b. Neither recruiting nor "tutoring programs" for blacks is a reasonable or viable alternative measure 33

CONCLUSION 35

TABLE OF AUTHORITIES

CASES

Adarand Constructors v. Pena,
515 U.S. 200 (1995) 4, 32

Albemarle Paper Co. v. Moody,
422 U.S. 405 (U.S. 1975) 21

Boston Chapter NAACP v. Beecher,
504 F.2d 1017 (1st Cir. 1974) 21

City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) 14

Crawford v. Marion County Election Bd.,
128 S.Ct. 1610 (2008) 31, 33

Griggs v. Duke Power Co.,
401 U.S. 424 (1971) 21

Grutter v. Bollinger,
539 U.S. 306 (2003) 4, 14, 22

Guiseppi v. Walling,
144 F.2d 608 (2d Cir. 1944) 31

Haig v. Agee,
453 U.S. 280 (1981) 4, 5

Hayden v. County of Nassau,
180 F.3d 42 (2d Cir. 1999) 24

Jordan v. City of Cleveland,
464 F.3d 584 (6th Cir. 2006) 26, 28

McNamara v. Chicago,
138 F.3d 1219 (7th Cir.), *cert. denied*, 525 U.S. 981 (1998) 15

Minnick v. Cal. Dept. of Corrections.,
159 Cal Rptr. 260 (1979) 15

New Haven Firefighters Local 825 v. City of New Haven, No. 3: 04-cv-1169 (D. Conn. Dec. 22, 2005) (Doc. 70) 25

Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1,
127 S.Ct. 2738 (2007) 32

Patrolman's Benevolent Ass'n v. City of New York,
310 F.3d 43 (2d Cir. 2002) 15

Petit v. Chicago,
352 F.3d 1111 (7th Cir. 2003) 15

Reynolds v. Chicago,
296 F.3d 524 (7th Cir. 2002) 15

Ricci v. DeStefano,
554 F. Supp. 2d 142 (D. Conn. 2006) . 17, 19, 23

Stuart v. Roache,
951 F.2d 446 (1st Cir. 1991), *cert. denied*, 504 U.S. 913 (1998) 15

Talbert v. City of Richmond,
648 F.2d 925 (4th Cir. 1981) 15

United Pub. Workers v. Mitchell,
330 U.S. 75 (1947) 24

United States v. City of Chicago,
663 F.32d 1354 (7th Cir. 1981) (en banc) 15

United States v. Paradise,
480 U.S. 149 (1987) 4, 5

Village of Arlington Heights v. Metro. Housing Dev. Corp.,
429 U.S. 252 (1977) 31

Washington v. Davis,
426 U.S. 229 (1976) 21, 31, 33

Wittner v. Peters,
87 F.3d 916 (7th Cir. 1996) 15

Wygant v. Jackson Bd. of Educ.,
476 U.S. 267 (1986) 15

CONSTITUTION

Equal Protection Clause . . . . . *passim*

Fourteenth Amendment 30, 32

Title VII 3, 5, 32

OTHER AUTHORITIES

Achieving and Maintaining a Diverse Fire Service Workforce (January 2006), *available at* https://www.iaff.org/hr/media/IAFF%20Diversity%20Report.pdf 17

Allen, Admiral Thad, Commandant, U.S. Coast Guard, *Diversity and Readiness*, Leadership J., July 25, 2008, *available at* http://www.dhs.gov/journal/leadership/ 2008/07/diversity-and-readiness.html 16

Altheied, David L., *Terrorism and the Politics of Fear* (2006) 13

America at Risk, America Burning Recommissioned (2002), *available at* http://www.usfa.dhs.gov/downloads/pdf/publications/fa-223-508.pdf. 11, 13, 14, 29

America Burning Revisited (1987), *available at* http://www.usfa.dhs.gov/applications/publications/display.cfm?it=5-0133 . . . . . 7, 26

Barrett, Richard S., *Challenging the Myths of Fair Employment Practices* (1998) 21

The Black-White Test Score Gap (Christopher Jencks and Meredith Phillips, eds., The Brookings Inst. Press 1998) 18

Borman, W. C., White, L. A., Pulakos, E. D., & Oppler, S. H., *Models of supervisory job performance ratings*, 76 J. of Applied Psychol. 863-872 (1991) 18

Brown, Michael K., et al., *Whitewashing Race* (Univ. Cal. Press 2d ed. 2003) 18, 23

Consolidated Amicus Brief of Lt. Gen. Julius W. Becton, Jr., et al., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) 4, 5

Dean, M.A., Roth, P.L., & Bobko, P., *Ethnic and gender subgroup differences in assessment center ratings: A meta-analysis*, 88 J. of Applied Psychol. 683-691 (2008) 19

E.E.O.C. Guidelines 21

FBI Law Enforcement Bulletin (2001) 13

Fulton, Deirdre, *Backsliding: Firefighters just aren't there yet*, Boston Phoenix, March 21-25, 2005,*available at* http://www.bostonphoenix.com/boston/news_features/this_just_in/documents/04559106.asp. 23, 28

http://fire2020.org/Newsletter/Diversity908.pdf. . 23

http://query.nytimes.com/gst/fullpage.html?res=990DE7DC1639F93BA35755C0A960958260&partner=rssnyt&emc=rss 17

http://www.blackchiefofficer.com/BCOC_Brochure-General.pdf 1

http://www.bls.gov 27

http://www.census.gov/Press-Release 12

http://www.fema.gov/hazard/dproc.shtm 9, 14

http://www.iabpff.org/index2.htm 1

http://www.nfpa.org 27

http://www.usfa.dhs.gov/about/ 8, 14

Kang, Jerry, and Banaji, Mahzarin R., *Symposium on Behavioral Realism*, 94 Cal. L. Rev. 1063 (2006) 20

King, Michael, *Disagreeing to Agree: With contract negotiations suspended, Austin firefighters look inward for a change*, Austin Chron., Jan. 16, 2009, *available at* http://www.austinchronicle .com/gyrobase/Issue/story?oid=oid:726663 . . . 28

Napolitano, Janet, Homeland Security Secretary, Remarks to the International Association of Fire Fighters in Washington, D.C. (Mar. 16, 2009), *available at* http://www.dhs.gov/ynews/ speeches/sp_1237294788434.shtm 10

New Haven 2007 EEO-4 Report 29

New Haven, Conn., Civ. Service Comm'n Rules, Rule III, Section 4 19

NFPA, *The U.S. Fire Service*, "The U.S. fire service (2007)," *available at* http://www.nfpa.org (select "Research," select "Fire statistics" under "Research," select "The U.S. fire service") . . . 27

NFPA, *The U.S. Fire Service*, "Fire Department Calls," *available at* http://www.nfpa.org (select "Research," select "Fire statistics" under

"Research," select "The U.S. fire service," select "Fire Department Calls") 11

Powell, General Colin, Speech to Bowie State University, Maryland (May 25, 1996) 16

Schmidt, N., et al., *Adverse Impact and Predictive Efficiency of Various Predictor Combinations*, 82 J. of Applied Psychol. 719-30 (1997) 18

Schorow, Stephanie , *Boston on Fire: A History of Fires and Firefighting in Boston* (Commonwealth Eds. 2003) 23

Sherman, Lawrence W., et al., *U.S. Department of Justice, Preventing Crime: What Works, What Doesn't, What's Promising* (1997) 13

Smith, M., *Why executives fail*, 10 Personnel Psychol 7-21 (1994) 18

Sternberg, R. J., *Managerial intelligence: Why IQ isn't enough*, 23 J. of Mgmt. 475-493 (1997) . . 18

U.S. Census Bureau, http://www.quickfacts/census .gov/qfd/states 12

U.S DOL, Bureau of Labor Statistics, Labor Force Statistics from the Current Pop. Survey, Table 11 (2008), http://wwwbls.gov/cps/tables.htm# charemp. 27

U.S. Fire Administration, *Fire in the United States 1995-2004* (14th ed. 2007), *available at* http://www.usfa.dhs.gov/statistics/ reports/fius.shtm 10

Work sample tests in personnel selection: A meta-analysis of Black-White differences in overall and exercise scores, 61 Personnel Psychol. 637-662 (2008) 19

www.fire2020.org/OurMission.html. 14

STATEMENT OF INTEREST OF AMICI[1]

Amicus International Association of Black Professional Fire Fighters, officially incorporated in 1970 in Hartford, CT, comprises 5,100 professional firefighter members, 200 lifetime members, and 90 local chapters, comprising cities in the U.S., England, Africa, and the Caribbean. The IABPFF seeks to foster interest and assistance in inter-group relations in fire service, including recruitment, hiring and promotion and, in particular, community relations. See http://www.iabpff.org/index2.htm.

Amicus Black Chief Officers Committee was formed in 1986 in Buffalo, NY, and officially incorporated in 2005. It is a premier network representing more than 500 black chief fire and EM officers from the U.S., England, Africa, and the Caribbean; its members have proven leadership and expertise in firefighter service and command. The organization's mission is to enhance black fire executives' ability to better serve the public and the firefighting profession. See http://www.blackchiefofficer.com/BCOC_Brochure-General.pdf.

Amici also comprise a number of distinguished individuals, including:

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court by letters dated February 12, 2009 and February 23, 2009. In accordance with Rule 37.6, *amici* state that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than *amici,* has made a monetary contribution to the preparation or submission of this brief.

James Clack, Chief of the Baltimore, MD, Fire Department. Chief Clack has been a firefighter since 1986 and served as chief of Minneapolis Fire Department from March, 2006, through April, 2008. During his tenure, Minneapolis was the first large metropolitan city to successfully develop a promotional selection process that integrated blacks, women, and other diverse groups into the officer ranks of the department.

Rocco Forte, Director of Regulatory Service and Emergency Management for the City of Minneapolis, MN. Mr. Forte was chief of Minneapolis Fire Department from July 1998, through June 2005. Under his direction, Minneapolis embarked on its efforts to reform the promotional selection methodology to result in a more diverse officer corps.

Sherman George, former chief of the St. Louis, MO, Fire Department, being the first African-American to attain the rank of chief in that department. He retired in 2007.

Ned Pettus, Chief of the Columbus, OH, Fire Department since 2000. Chief Pettus, the first African-American chief of the Columbus department, has been a career officer and firefighter there, and oversees an increasingly diverse population, including approximately 50,000 Somalis.

Paul Stubbs, Chief of the Cleveland, OH, Division of Fire since 2004. Chief Stubbs, a career firefighter and officer in Cleveland, is the first African-American to serve in that capacity in Cleveland, a city which is over 51% African-American and seeing rapidly increasing diversity in population.

Robert Wright, Chief of the Cincinnati, OH, Fire Department since 1997. Chief Wright is the first African-American officer to serve in such a capacity in that city, as well as being the first black officer at each rank in progression in Cincinnati's fire department.

Kyle Brink, Ph.D., Brian Bellinger, Ph.D., and Jeffrey Crenshaw, Ph.D. industrial organizational psychologists who specialize in safety force testing, centered in Jefferson County, AL. Hired by a federally appointed receiver designated by the U.S. Dist. Court, M.D. AL, Drs. Brink, Bellinger and Crenshaw successfully eliminated written tests altogether for fire promotional examinations while operating under a federal court consent decree, which was dissolved in late 2008.

Amici disagree with Petitioners that strict scrutiny is required in this situation, for reasons set forth in the brief of Respondents and other *amici* for Respondents. Moreover, Respondents did not invoke a goal of diversity per se, but rather a compelling interest in compliance with Title VII. However, Petitioners and their *amici* have argued that diversity is directly at issue and have sought to raise arguments under the Equal Protection Clause on that very basis. The questions presented by the Court also are generally tied to the Equal Protection Clause.

As such, this case will likely have major implications for diversity in fire service in general, and for *amici* in particular, as well as the cities in which they serve.

Amici argue that diversity is a compelling state interest as a matter of national security in fire-service

to meet the changing demands of a changing American population. As such, *amici* have a deep interest in the outcome of this case. They thus join the city of New Haven in seeking affirmance of the lower courts, for the reasons stated *infra*.

SUMMARY OF ARGUMENT

In *Adarand Constructors v. Pena*, 515 U.S. 200, 237 (1995), this Court declared, "[W]e wish to dispel the notion that strict scrutiny is "'strict in theory, but fatal in fact.'[] The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." Few places show more unhappy persistence of discriminatory practices and attitudes than in the fire service of the United States.

At present, this Court has found compelling state interests in diversity in higher education (*Grutter v. Bollinger,* 539 U.S. 306 (2003)) and past demonstrated or a history of discrimination (*See, e.g., Adarand,* at 237; *United States v. Paradise*, 480 U.S. 149, 166 (1987) (plurality opinion) (finding a compelling interest in remedying past and present discrimination against state troopers)). This Court also has found a compelling state interest in the nation's national security. *Haig v. Agee*, 453 U.S. 280, 307 (1981) ("It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation."). *See, also,* Consolidated Amicus Brief of Lt. Gen. Julius W. Becton, Jr., et al. ("military brief") in *Grutter* (compelling interest in military diversity is fully supported by military and federal government officials).

To date, this Court has reserved the question of whether there is a compelling state interest in diverse local safety forces. See *Paradise*, 480 U.S. at 166. *Amici* argue that day has come. Not only is diversity mandated by Title VII and equal protection in this case, it is also made necessary by (and correlates to) a compelling state interest in promoting and maintaining diversity in our nation's first responders and local fire service, in the interests of national security, particularly at higher ranks.

This, too, is recognized by the distinguished former military and U.S. Senate *amici* in the *Grutter* military brief. Fire service parallels the military in terms of employing a paramilitary ranking system and deploying first responders to serve communities in times of emergency and catastrophe, both on the local and national landscape, as shown *infra.*

While in *Haig,* the Court was concerned with military readiness for war, recent incidents such as 9-11, Oklahoma City, Katrina, the California wildfires have instructed us that readiness is also compelling at the local level, in order to keep the nation, localities, and citizens safe from fires, floods, hurricanes, and other disasters -- both natural and manmade. In current times, this interest is possibly even more compelling, and so is the diversity required to adequately address increasingly diversified population concerns.

And, just as the United States military has recognized a compelling need for integrated forces in both lower ranks and officers, so, too, does the nation's fire services, which protect our country internally, and which share a nearly identical paramilitary structure

of command. The current lack of African-Americans and other minorities in higher ranking positions contributes daily to racial strife within the ranks of fire departments across the country, and threatens the cohesive, organized, and interconnectedness of fire corps needed to battle increasingly volatile needs for military-like readiness for domestic emergencies.

As with the military, fire service has undergone growing pains. For decades in the earlier part of the 20th century, it was strictly dominated by whites in all ranks and, like the military, tended to enjoy (particularly with ranking officers) a peculiar sense of "tradition," of legacies and closed traditions of handing down fire careers from fathers to sons. In the 1960s and 1970s, as more blacks attempted to gain entrance into the fire-fighting profession, numerous attempts were made to close ranks and keep them out. Racism in both hiring and promotion was rampant, as attested to by the numerous cases filed and consent decree judgments entered by courts during the late 1960s through the 1980s. These decrees had to take race into account to overcome the decades of racial discrimination and segregation, vestiges of which still linger in the fire service today.

Today in this country, there are approximately 323,000 career firefighters. As the decrees have expired, the percentage of professional black firefighters in the United States has drastically declined by nearly half, as shown *infra.* This is due in part to a large drop in minority hiring. Moreover, those hired under the desegregating consent decrees of the 1970s and 1980s are at or near the retirement stage of their careers. The implications for the future of a diverse firefighting force are ominous, particularly in

the face of a nationally recognized, changing face of America and increasing need for diversity in homeland security and protection, particularly at the command levels.

Other forces also are diminishing the diversity of America's fire service, particularly in the vital area of commanding ranks. Although many fire departments continue to utilize so-called "job knowledge" tests for hiring and especially promotion, it is widely known and accepted that cognitive examinations, such as used here, have a demonstrated adverse impact on blacks and other minorities. As the record and other empirical evidence show, there are known alternative measures of equal validity with less discriminatory impact on African-Americans and other minorities. Further, Petitioners have pointed to no studies showing that firefighting has "suffered" since blacks began being hired or promoted. Indeed, at the height of the consent decree hirings in the 1970s and 1980s, fire deaths actually diminished. See *America Burning Revisited* (1987), *available at* http://www.usfa. dhs.gov/applications/publications/display.cfm?it=5-0133.

Moreover, despite claims to the contrary by Petitioners, the tests at issue were not conclusively "valid" or "validated." There is no evidence that any of the candidates was more qualified than another. The tests also had a clear adverse impact on blacks in New Haven's fire service. New Haven's decision not to certify the examinations in anticipation of instituting more accurate, less-discriminatory alternative measures did not intentionally classify or disfavor individuals because of their race.

Faced with admitted adverse impact, there was no better method available to New Haven to avoid adverse impact than non-certification of the exams at issue. This was also important to avoid further eroding the diversity of the New Haven department and fire service, particularly where it is most needed: in the upper ranks. In light of the compelling state interest in a nationally diverse fire service, and the dearth of viable alternatives, New Haven's one-time act was constitutionally legitimate.

ARGUMENT

THERE IS A COMPELLING STATE INTEREST IN PROMOTING AND PRESERVING DIVERSITY IN OUR NATION'S FIRE SERVICE

Since 9-11, the United States has explicitly recognized that firefighters meet a compelling need as "first responders" in emergencies, and that the local firefighters are the bulwark of readiness for emergencies, prevention, and community public safety. This is reflected, in part, by the fact that the United States Fire Administration ("USFA") is now part of the Department of Homeland Security, falling directly under the auspices of the Federal Emergency Management Administration ("FEMA"). See http://www.usfa.dhs.gov/about/ ("As an entity of the Department of Homeland Security's Federal Emergency Management Agency, the mission of the USFA is to foster a solid foundation in prevention, preparedness, and response by providing national leadership to local fire and emergency services.").

Indeed, the term "firefighter" is actually somewhat of a misnomer in today's environment. While firefighting remains an important aspect of the job, over the past twenty-five years firefighting has evolved into what is more accurately described as "first responders." See http://www.fema.gov/hazard/dproc.shtm (**"First Response** to a disaster is the job of local government's emergency services with help from nearby municipalities, the state and volunteer agencies. In a catastrophic disaster, and if the governor requests, federal resources can be mobilized through the U.S. Department of Homeland Security's Federal Emergency Management Agency [] for search and rescue, electrical power, food, water, shelter and other basic human needs.") (emphasis in original).

In March 2009, the United States reinforced its strong commitment to firefighters as "partners" with Homeland Security and as the "face of Homeland Security." Janet Napolitano, Homeland Security Secretary, in a speech delivered to members of the International Association of Firefighters (IAFF), declared:

> As you know, FEMA is not a first responder. You are the first responders…. FEMA's job is to support you and to support you in a number of ways, by providing grants, training, equipment, exercises, by helping coordinate disaster planning across the country, including pre-disaster planning; and to assist in post-disaster recovery. But it is really our firefighters, our police; those are the individuals that show up at the door on the day, the hour of a disaster, the day after, and the like. And when a city or

> locality needs assistance, the state comes in and then FEMA is there to back it up.

Janet Napolitano, Homeland Security Secretary, Remarks to the International Association of Fire Fighters in Washington, D.C. (March 16, 2009), *available at* http://www.dhs.gov/ynews/speeches/sp_1237294788434.shtm.

First response, in other words, is national in scope at local levels. However, the United States also regards local first response to *local emergencies* as a national compelling interest. As noted by the USFA: "The United States has a severe fire problem, more so than is generally perceived. Nationally, there are millions of fires, tens of thousands of injuries, and billions of dollars lost – which makes the U.S. fire problem one of great national importance." U.S. Fire Administration, *Fire in the United States 1995-2004* (14th ed. 2007), p. 35, *available at* http://www.usfa.dhs.gov/statistics/reports/fius.shtm.

As increasing chaotic weather contributes to wildfires, flooding and other issues facing individual communities, such first responders increasingly grow in importance. For example, FEMA now gives cities and communities federal dollars for emergency management, and also trains first responders for deployment to other areas in need. FEMA also subsidizes many cities via funding and first responder training through grants ("SAFER") for community education and prevention.

Not only is recovery compelling; equally compelling is fire and emergency prevention and education in local communities. As noted by James Witt, then-

Director of FEMA, in his forward to *America at Risk, America Burning Recommissioned* (2002):

> Our community fire departments and firefighters are at the vanguard of the long-term effort to address our fire risks. Not only are they the first responders to fire and other natural and man-made disasters, but also they have been strong advocates of effective codes and standards; they visited our schools and neighborhoods with educational material on fire risks, and they have put their lives on the line countless times. They will continue to do so. There is ample proof that the word hero is a correct attribute of our Nation's firefighters.

Id. at http://www.usfa.dhs.gov/downloads/pdf/publications/fa-223-508.pdf.

Moreover, fires do not comprise the lone subject of the job of the professional firefighter. Today, only 6% of our nation's firefighter emergency runs are actual fire runs. NFPA, NFPA, *The U.S. Fire Service*, "Fire Department Calls," *available at* http://www.nfpa.org (select "Research," select "Fire statistics" under "Research," select "The U.S. fire service," select "Fire Department Calls"). Indeed, the largest single component of response runs of fire departments is emergency medical runs, which have increased threefold since 1980 and currently comprise in excess of 62% of the response runs today. *Id*. Most urban departments (and 59% of all fire U.S. departments) have emergency medical response units, as well as hazardous materials units and rescue squads, all requiring specialized training in non-firefighting techniques.

It is universally recognized that cities, such as New Haven, operate not just as "public employers" in this regard, but also as providers of vital public services, owned by the public and funded also in part by the federal government. Thus, firefighting serves a tripartite interest: cities as employers, firefighters as employees/first responders, and the communities served by them. Public trust and safety are vital to the nation's interest, as are cohesive and diverse officer and firefighter corps.

Moreover, as argued *infra,* the concept of "community" is an inherent part of the need for diversity in our firefighting forces. Numerous studies and statistics have shown that, as communities become more diverse, the need for diversified ability to serve them becomes apparent, as does the need for internally diverse and cohesive firefighting forces in our nation's cities, which is currently sorely lacking.

1. Diversity Is Necessary for Adequate Community Service, Cohesiveness and Command in the Fire Services.

American cities are reflecting rapidly changing demographics. Our country is becoming more diverse even faster than projected just a few years ago. Current estimates by the U.S. Census Bureau predict that no racial group will be in a "majority" by 2042, and non-white groups are projected to constitute roughly 54% of the overall population by 2050. http://www.census.gov/Press-Release. Indeed, the states of California and Texas already have reached similar levels. See U.S. Census Bureau, http://www.quickfacts/census.gov/qfd/states).

As in the military, in the fire service trust and communication are essential to performing the functions of first responders. This is true for not only emergency response situations, but in the education and community service aspects of the first responder functions, as well.

It is particularly imperative in culturally diverse communities, where occupants often share an innate fear of persons in uniform and exhibit more trust if the person shares some cultural characteristics of their own. *See, e.g.,* Lawrence W. Sherman, et al., *U.S. Department of Justice, Preventing Crime: What Works, What Doesn't, What's Promising*, 8-26 (1997); David L. Altheied, *Terrorism and the Politics of Fear* (2006) (citing scholarly research on the connection of uniforms, social control, and the community distrust and fear); FBI Law Enforcement Bulletin (2001) ("clothing [particularly uniforms] has a powerful impact on how people perceive each other").

Succinctly stated, in responding to any emergency, it matters who enters the building, it matters who does the talking and it matters as to what they say, how they will be understood. Context is essential. So is the ability to command a diverse and cohesive force – the true meaning of "merit." See *America at Risk: America Burning Recommissioned 2002*, http://www.usfa.dhs.gov/downloads/pdf/publications/fa-223-508.pdf., Finding #11, page 29 ("There is still much to be done in building diversity into the service's organizational structure and the agenda of the emergency services…. Much of the strength of the fire and emergency services derives from their acceptance by the communities and neighborhoods they serve. This strength is enhanced to the extent that the fire

services reflect the make-up of the community they serve.").

The Report recognized that, "although the overall membership of the fire service has become more diverse, there are still a number of fire departments in which diversity does not exist or where there are barriers that limit either the upward or lateral mobility of minorities and women, irrespective of merit." *Id.* Moreover, "[a] fire department that reflects and represents the diverse community it serves, reduces language barriers, increases trust, and provides for two-way learning to close knowledge gaps. Multicultural communities become powerful partners for prevention." www.fire2020.org/OurMission.html.

In *Grutter*, both Justices Thomas and Scalia recognized that national security could be a compelling state interest or "pressing public necessity." *Id.,* at 353 (Thomas, J., dissenting), citing Justice Scalia's concurring opinion in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) ("At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb…can justify [racial discrimination]."). *Id.*

Surely there is no stronger "social emergency" or "pressing public necessity" than when medical, fire, or other emergencies in our communities arise, which in turn affects the nation at large. See http://www.usfa.dhs.gov/about/; http://www.fema.gov/hazard/dproc.shtm. Firefighting, prevention, and

emergency response are thus both microcosmic and macrocosmic issues.[2]

Moreover, several lower courts have found that "race-conscious" acts by public employers do not violate the Equal Protection Clause if narrowly tailored, including those in law enforcement and legal corrections settings in the interests of diversity, and especially, community.[3]

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[2] It is axiomatic that the nation's communities cannot be in a state of "readiness" as paramilitary organizations – diversity-wise -- at the drop of a hat. The need for readiness is a perpetual, 24/7 job. Fires, bombs, bio-hazards, natural catastrophes, and medical emergencies rarely knock politely on the door and announce their presence.

[3] The interest typically has been defined as "operational need," upholding conscious acts in favor of diversity even in the absence of past discrimination, and premised on the finding that "the composition and operation of the [] force should be in as complete harmony as possible with the community from which it springs." *United States v. City of Chicago,* 663 F.32d 1354, 11364 (7th Cir. 1981) (en banc). *See, also*, *Petit v. Chicago*, 352 F.3d 1111, 1115 (7th Cir. 2003); *Reynolds v. Chicago,* 296 F.3d 524, 530-31 (7th Cir. 2002); *McNamara v. Chicago,* 138 F.3d 1219, 1223-24 (7th Cir.), *cert. denied,* 525 U.S. 981 (1998); *Talbert v. City of Richmond,* 648 F.2d 925, 931-32 (4th Cir. 1981); *Stuart v. Roache*, 951 F.2d 446, 450-52 (1st Cir. 1991), *cert. denied ,*504 U.S. 913 (1998); *Wittner v, Peters,* 87 F.3d 916 (7th Cir. 1996) (corrections setting); *Minnick v. Cal. Dept. of Corrections.*, 159 Cal Rptr. 260 (1979); *see, also, Patrolman's Benevolent Ass'n v. City of New York,* 310 F.3d 43 (2d Cir. 2002) (recognizing need for diversity as operational need, but failing to find narrow tailoring); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 314 (1986) (Stevens, J., dissenting) (noting the importance of law-enforcement community trust and relations in some instances, justifying limited race-based actions or policies).

Diversity as a compelling interest in fire service is defined as more than mere "aesthetic" goals or having a "certain appearance" in the fire department for public approval. Rather, it is a necessary component of the very fabric of our homeland safety and cohesion in the ranks of the paramilitary organizations of fire departments. Just as long ago recognized by the military (through hard, nearly riotous times), so it must be recognized here, as well: that diversity is a compelling state interest in any paramilitary system of a similar nature and structure assigned to the public duty of protecting the nation's people. See, e.g., Remarks of Admiral Thad Allen, Commandant, U.S. Coast Guard, *Diversity and Readiness*, Leadership J., July 25, 2008:

> Diversity is a concept that extends far beyond the traditional legal notions of equal opportunity and civil rights. Diversity is really the broad representation of culture, religion, values, ethnicity, gender, education, life experience, professional qualification, and the other many things that make us unique as individuals. As I noted in my remarks at NNOA[,] inclusion of diverse individuals and viewpoints produces better decisions and action in organizations. I really see diversity as a readiness issue that all of our senior leaders and unit commanding officers must consider as one of the keys to effective mission execution.

http://www.dhs.gov/journal/leadership/2008/07/diversity-and-readiness.html; *see, also,* General Colin Powell, Speech to Bowie State University, Maryland (May 25, 1996), defending affirmative action as a

necessary way to reach a "color-blind" society and acknowledging "it's not over yet").[4]

Recently, the International Association of Fire Fighters (IAFF) commissioned a large study for cities across the nation to assess the importance of diversity in fire departments, and efforts to increase it through hiring. See *Achieving and Maintaining a Diverse Fire Service Workforce* (January 2006), *available at* https://www.iaff.org/hr/media/IAFF%20Diversity%20Report.pdf, finding that the "best practices" departments regularly took race into account in attempting to diversify their forces and meet the changing needs of a fire service in an ever-changing American landscape.

2. The Examinations at Issue Did Not Realistically Test for "Merit" in Fire Command Scenarios.

As the district court rightly noted, "performing well on an exam does not create an entitlement to promotion….Second, a presumptively flawed test result may not be a proper measure for determining whether anyone should be promoted." *Ricci v. DeStefano,* 554 F.Supp.2d 142, 161-62 (D. Conn. 2006).

"Merit" in firefighting is, at best, an amorphous concept. Indeed, in any profession, "[m]erit must be merit in reference to something, for some purpose, based on some set of judgments and justifications…. When merit is defined as excellence in test-taking,

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[4] http://query.nytimes.com/gst/fullpage.html?res=990DE7DC1639F93BA35755C0A960958260&partner=rssnyt&emc=rss.

however, the selection process is not as color-blind as it claims to be." Michael K. Brown, et al., *Whitewashing Race* (Univ. Cal. Press 2d ed. 2003) at 191 (noting faulty use of LSAT tests for admission).

Amici assert that, in firefighting, particularly in the upper ranks, "merit" is more a reflection of character, integrity, and command constructs that do not lend themselves well to written "job knowledge" tests preferred by Petitioners and many persons who sue cities for reverse discrimination. It is widely known that blacks and Hispanics in any high-stakes testing, such as firefighter promotional exams, typically score lower than particularly on traditional cognitive exams. However, it also is known that such exams, which typically test so-called "job knowledge," are not particularly highly correlated with on-the-job-success, and indeed tend to result in a phenomenon referred to as "selection system bias." *Whitewashing, supra,* at 63, citing N. Schmidt, et al., *Adverse Impact and Predictive Efficiency of Various Predictor Combinations*, 82 J. of Applied Psychol. (1997), at 719-730; *The Black-White Test Score Gap* (Christopher Jencks and Meredith Phillips, eds., The Brookings Inst. Press 1998), at 57-58.

Indeed, abundant research shows that job knowledge is only a small part of the job performance domain, and clearly not the most important factor influencing job performance ratings. *See, also,* Borman, W. C., White, L. A., Pulakos, E. D., & Oppler, S. H., *Models of supervisory job performance ratings*, 76 J. of Applied Psychol. 863-872 (1991); Sternberg, R. J., *Managerial intelligence: Why IQ isn't enough*, 23 J. of Mgmt. 475-493 (1997); Smith, M., *Why executives fail*, 10 Personnel Psychol 7-21 (1994).

Further, research has shown that other types of testing measures have smaller black-white group differences, such as assessment centers and work samples. See, Dean, M.A., Roth, P.L., & Bobko, P. *Ethnic and gender subgroup differences in assessment center ratings: A meta-analysis*, 88 J. of Applied Psychol. 683-691 (2008); *Work sample tests in personnel selection: A meta-analysis of Black-White differences in overall and exercise scores*, 61 Personnel Psychol. 637-662 (2008).

It is assumed that candidates for promotion in the fire service already meet the basic knowledge requirements, including years in rank and satisfactory performance on the job. When hired, they enter a training academy that teaches them the basics; the rest is learned on the line. At the promotional level, "job knowledge" is presumed; in learning to deal with national emergencies, training is used. The mere fact that "multiple guess" is a cheap method of testing for cities is irrelevant. Many newer and more sophisticated testing methods, such as assessment centers and other measures and criteria for promotion are just as valid and cost-efficient. New Haven is free by civil service rule to use them. See Joint Appendix, A332 New Haven, Conn., Civ. Service Comm'n Rules, Rule III, Section 4 (allowing much leeway in choice of test types).

As noted in the district court's opinion, Petitioners' primary explanation for the adverse impact on black promotional candidates is that "the higher-scoring firefighters simply studied harder." *Ricci,* 554 F.Supp.2d at 150-151. However, the differences in scores are not due to intelligence or study habits, but largely to the implicit problems that arise in high-

stakes testing and candidates' own innate awareness of the stereotypes at play.[5]

> As noted by Richard S. Barrett, an industrial-organizational psychologist,
>
> Knowing what to do and being able to do it are two different things…. Stressful jobs, like those of police officers and firefighters, are especially prone to this problem.
> ***
> Generally, important information and the situation to which it is applied are too complex for a multiple-choice format. The result is a test that relies heavily on trivia ….Much of the limitations of multiple-choice tests can be summed up by the term *surface processing*. They are characterized by superficial information that is discrete and trivial. They do not reward – in fact, they punish – the applicant who carefully considers problems before acting.

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[5] Recent research in Implicit Associational Testing (IAT), which uses novel methods to ferret out hidden biases and stereotypes not present in self-report studies, has revealed that, under given conditions, blacks, women and even white males suffer from "stereotype threat," where test results can be manipulated by merely showing "success rates" of other groups compared to the race or sex of those taking the tests. Control groups without the stimulation scored as well as whites. Indeed white males shown articles on "superiority" of Asians in math tests scored lower than Asians as a result. There also is a phenomenon called "stereotype boost," in which persons primed or expecting to do better than on high-stakes testing, actually do, regardless of actual ability of the two groups. See Kang, Jerry, and Banaji, Mahzarin R., *Symposium on Behavioral Realism,* 94 Cal. L. Rev. 1063, 1087-88).

Barrett, Richard S., *Challenging the Myths of Fair Employment Practices,* (1998), at 46.[6]

See, also, Boston Chapter NAACP v. Beecher, 504 F.2d 1017, 1023 (1st Cir. 1974):

> There is a difference between memorizing (or absorbing through past experience) the firefighter terminology and being a good firefighter. If the Boston Red Sox recruited players on the basis of their knowledge of baseball history and vocabulary, the team might acquire authorities….who could not bat, pitch, or catch.

Petitioners' claim in this case that blacks just didn't study as hard is a bell continuously rung in a majority of recent "reverse" discrimination cases. Such thinking – and, often, promotions as a result of poorly constructed exams – merely serves to buttress many white firefighters' false sense of superiority, reinforcing classic examples of debasing stereotypes that African-Americans are just "dumb" and/or "lazy." Not only is this irrational, it is demeaning to all firefighters and the diverse communities they serve. And it is entirely unsupported.[7]

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[6] Dr. Barrett testified in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) and *Washington v. Davis,* 426 U.S. 229 (1976). He also was instrumental in helping to draft the current version of the *E.E.O.C. Guidelines.*

[7] Indeed, for all Petitioners' complaints about how much time they spent studying for the exams, "[t]he time spent on learning to take tests is of no benefit to the employer." *Challenging, supra,* at 44.

The problem of continuing reliance on exams with proven adverse impact on minorities was well-put by Justice Thomas, joined by Justice Scalia, in *Grutter*:

> Similarly no modern law school can claim ignorance of the poor performance of blacks, relatively speaking, on the Law School Admissions Test (LSAT). Nevertheless, law schools continue to use the test and then attempt to "correct" for black underperformance by using racial discrimination in admissions….. The Law School's continued adherence to measures it knows produce racially skewed results is not entitled to deference by this Court….An infinite variety of admissions methods are available to the Law School.

Id., 539 U.S. at 370 (Thomas, J., concurring and dissenting in part, joined by Scalia J. (Parts I-IV)).

Long ago Albert Einstein observed that the definition of "insanity" is doing the same thing over and over again and expecting different results. Here, New Haven took the measure of not certifying the exams or promoting anyone, so it could explore more accurate, valid, and less discriminatory alternatives, as discussed at the certification hearings held by the city. The hearings showed both the existence of such measures, and also the history of New Haven promotional exams in the past that had adverse impacts on blacks, particularly the tests at issue.

Rather, what matters is not skill at test-taking but proper tests with lesser adverse impact that are a better predictor of first-responder command capabilities.

Moreover, as the district court rightly pointed out, no candidate taking either exam had or has a vested right in promotion. *Ricci*, 554 F.Supp.2d at 160.

3. The Impediment of "Tradition" in the Fire Service

It is well-documented that the fire service in America is characterized by its legacies. *See, e.g.,* http://fire2020.org/Newsletter/Diversity908.pdf. According to Stephanie Schorow, author of *Boston on Fire: A History of Fires and Firefighting in Boston* (Commonwealth Eds. 2003), firefighting is a longstanding tradition of legacy. "Many firefighters, their grandfathers, their fathers were firefighters, they want their sons to be firefighters." See Deirdre Fulton, *Backsliding: Firefighters just aren't there yet*, Boston Phoenix, March 21-25, 2005, *available at* http://www.bostonphoenix.com/boston/news_features/this_just_in/documents/04559106.asp.

In any career fire department, it is commonplace to see the same surnames on seniority rosters spanning decades. In essence, the fire service, like many other professions, can often exemplify "opportunity hoarding by one group to the detriment of another." See *Whitewashing Race*, *supra,* at 191. Indeed, "opportunity hoarding" can be widely seen in the numerous reverse discrimination suits against fire departments by individuals, such as Petitioners, seeking to restore the former status quo, and falling victim to believing that every act that increases diversity on a firefighting force necessarily is intentionally "racist" against whites.

In *Hayden v. County of Nassau,* 180 F.3d 42 (2d Cir. 1999), for example, several white police applicants unsuccessfully sued the county under the Equal Protection Clause when the county altered its testing from multiple guess to equally valid entrance exams that had a lesser adverse impact on blacks. The plaintiffs, like Petitioners, preferred the traditional tests and accused the county of race discrimination merely because it sought to increase its department's diversity.

The trend is a type of reverse "political correctness" where the goal is to ensure that a city fire or police department has no deference at all. Yet, such would be the bane of the civil service system, which has been called "the one great political invention of nineteenth century democracy" and is in place to ensure that communities are properly protected by public entities that serve them. See *United Pub. Workers v. Mitchell*, 330 U.S. 75, 121 (1947) (Black, J., dissenting). Any smoothly functioning civil service system requires a limited but reasonable amount of deference, such as allowing implementation of diversity-based initiatives in first-response safety forces. Certainly, it allows such systems to refuse to certify tests that have an adverse or discriminatory impact, rather than promoting from them.

As shown *infra,* however, the most pernicious aspect of entrenched traditions is that black firefighters hired under consent decrees are now coming of age for retirement. Their numbers are not being replenished but are decreasing. Even in cities increasing diversity hiring, it is still a matter of years until such new hires are even eligible for promotion to higher rank. The result is that, as domestic

emergencies increase and as America's communities become more diverse, fire departments are becoming increasingly less diverse at the higher levels of command, where the need is greatest.

4. A Future Jeopardized: Impending Black Retirements and Diminishment of Black Diversity in Fire Service and First Response.

The American fire service did not truly start being integrated until courts stepped in, and numerous consent decrees across the country ordered racial hiring as a remedy for clear and ongoing discrimination and segregation in the 1970s and 1980s. To the "legacies," this was bad enough, but after a few years in rank, such newly hired blacks would be eligible for promotion, meaning they could occupy positions of command. Various methods to avoid or dilute minority upward mobility were employed, often at the behest, or with the assistance, of powerful, white-controlled public fire unions. (Indeed, it is undisputed that the New Haven firefighters union, Local 825, filed a companion suit to this one on behalf of its white members; the suit was dismissed by the district court, which found lack of standing and serious potential conflicts of interest. See *New Haven Firefighters Local 825 v. City of New Haven,* No. 3: 04-cv-1169 (D. Conn. Dec. 22, 2005) (Doc. 70).

It is not just in testing that the entrenched class protects its own sense of entitlement. Nearly all black first responders, particularly the few ones achieving rank, can share stories of debilitating treatment throughout their years of service based on race – some seemingly neutral on their face but *not* neutral and done with purpose to discriminate – created to keep

blacks and other minorities "locked in" to lower ranks, if they manage to get hired at all.[8]

Due, in part, to lack of numbers, it is pervasive throughout blacks' experience in the nation's fire service that they are perceived by many whites unqualified or lesser qualified. Yet, there is virtually no factual support for this notion. Petitioners cite no studies indicating that black officers are less capable than their white counterparts.[9]

Indeed, nearly all professional fire departments, including New Haven, utilize what is known as "Acting Time," in which lower raking officers are assigned in higher-ranking positions and perform in such positions (at the higher rate of pay) without undergoing "merit" testing. Skilled and experienced black officers who have successfully acted in higher ranks often prove their merit through actual performance. Yet, as younger, less experienced white firefighters rise up

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[8] This "locked-in" syndrome is well-recorded in other employment arenas, but is particularly visible in fire service. For example, in Cleveland, union and some city officials dealt with a promotional consent decree from the 1980s by assuring that virtually all blacks achieving promotion under the decree were assigned to a single battalion (Bat. 5); there are 6 battalions total. Bat. 5 was dubbed "Monkey Island" by many of the whites because virtually all of the officers and the overwhelming majority of black firefighters were and remained assigned there. This was not 1962 or 1982, but 2004. See *Jordan v. City of Cleveland,* 464 F.3d 584, 589 (6th Cir. 2006).

[9] To the contrary, since the period of fire integration during the period of the 1970s and 1980s, when black firefighters were hired under consent decrees, fire deaths actually dropped. See *America Burning Revisited, 1987, supra*.

through the system, older and more experienced black first responders are taking orders (and sometimes giving advice) in a career in which they cannot seem to move ahead.

With the expiration of many fire department consent decrees in the late 1980s and 1990s, minority hiring dropped off sharply. Indeed, the number of black firefighters compared to whites in the U.S. fire service is diminishing at an alarming rate. So are the numbers of black ranking officers in fire service.

For example, in 1995, black representation in professional fire service was at its peak, at approximately 15.3%. See NFPA, *The U.S. Fire Service*, "The U.S. fire service (2007)," *available at* http://www.nfpa.org (select "Research," select "Fire statistics" under "Research," select "The U.S. fire service").

In 2008, only 8.2% were black, and of first-line supervisors, only 5.8% were black. See U.S DOL, Bureau of Labor Statistics, Labor Force Statistics from the Current Pop. Survey, Table 11 (2008), http://www.bls.gov/cps/tables.htm# charemp.[10]

While, to date, there is no comprehensive source of city fire department demographics, the numbers from

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[10] On a departmental level, 13% of all fire departments (estimated 30,185 total number of departments) are career or mostly career and protect 62% of the U.S. population; 74% of the career firefighters are in communities that protect 25,000 or more. See http://www.nfpa.org. In 2008, there were 320,000 career firefighters and fire inspectors in 2008 and 54,000 first-line supervisors in firefighting and prevention. http://www.bls.gov.

select large cities around the nation are telling. For example, as of 2004 in Cleveland, OH, which has a 51% black population, less than 22% of its firefighting force was black. That disparity was reflected to an even greater degree among the fire division's officers: only 25 black lieutenants out of 178; two black captains out of 62; three black battalion chiefs out of 29; and two black assistant chiefs out of seven (at least one of them had been promoted only after filing a discrimination suit). See *Jordan,* 464 F.3d at 589.

In Boston, MA, as of March 2, 2005, 33% of the 1450 uniformed firefighters in the department were minorities; of those, 384 were black, 105 were Hispanic, 16 were women, and only one was Asian. The leadership positions were dominated by white men, who comprised 185 of 217 lieutenants, 75 of 79 captains, and 56 of 60 district chiefs. See Deirdre Fulton, *Backsliding: Firefighters just aren't there yet*, Boston Phoenix, March 21-25, 2005, *available at* http://www.bostonphoenix.com/boston/news_features/this_just_in/documents/04559106.asp.

In Austin, TX, as of January 2009, uniformed firefighters and specialists in the department comprised a total complement of 1,013. Of 531 members at the firefighter rank, only 7.2% (38) are black. There are only 5 black lieutenants out of 178, one black captain out of 68, no black battalion or division chiefs, and only one black assistant chief. See Michael King, *Disagreeing to Agree: With contract negotiations suspended, Austin firefighters look inward for a change*, Austin Chron., Jan. 16, 2009, *available at* http://www.austinchronicle.com/gyrobase/Issue/story?oid=oid:726663.

In New Haven, as of 2007, while there are 99 blacks out of 359 uniformed personnel and a total of 82 officers, only 13 are officers are black. Source: New Haven 2007 EEO-4 Report.

Moreover, a disproportionate number of African-Americans in the fire service today were hired in the 70s and 80s under consent decrees or as a result of litigation. Most in this block of first responders are eligible for retirements (if not already retired) and will be retiring within the next five years. For example, in Cincinnati, OH, 94 of the 251 African-American firefighters on the job (out of 851 total) were hired prior to 1989. Out of a total of 46 black officers, 28 are slated to retire within the next few years.

Consequently, the use of inherently discriminatory and ineffective testing methods, such as those preferred by the Petitioners and their *amici*, will necessarily result in staffing and promotion of predominantly white personnel. The effect of this is self-evident: as American communities rapidly become more diverse, the fire service will be heading in the distinctly opposite direction, impeding its effectiveness and ability to fulfill its vital role in the nation's security.

USFA's James Witt recommends, "There should be recognition and respect for leaders and departments that put an end to those traditions that limit evolution toward a diverse fire and emergency services organization." *America Burning Recommissioned, supra,* at 30.

NEW HAVEN'S RESPONSE TO THE EXAMS' ADVERSE IMPACT WAS NARROWLY TAILORED

1. There Was No Racial Classification or Discriminatory Intent in New Haven's Decision Not to Certify the Examinations.

As stated in their Statement of Interest, *amici* do not think this case is one that used illegal race-based decisions in refusing to certify the exams. Thus, strict scrutiny is not warranted, as no proof of intent was shown, no individuals were singled out for preference or harm, nor was any racial classification system employed. In *amici*'s view, New Haven's actions were entirely proper and constitutional under the circumstances.

However, in the event this Court finds that strict scrutiny is warranted, *amici* already have shown a compelling state interest in the need for a diverse, cohesive fire-fighting force in a constant state of readiness for local and national disasters. Moreover, New Haven's response was sufficiently narrowly tailored to pass constitutional muster. Indeed, it is Petitioners who are seeking unfair classifications based on their "whiteness" and on allegedly deserved promotions that they never even prayed for in their complaint.

Members of this Court have held that, "without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional.... The Fourteenth Amendment does not regard neutral laws as invidious ones, *even if their burdens purportedly fall disproportionately on a protected*

class." *Crawford v. Marion County Election Bd.,*128 S.Ct. 1610, 1626 (2008) (Scalia, J., concurring opinion, joined by Thomas, J., and Alito, J., citing *Washington,* 426 U.S. at 248 (1976)) (emphasis added).

Here, Petitioners simply appear to be accusing New Haven of affirmative *inaction.* There is no evidence of any racial classifications of persons in the New Haven fire department that were favored or disfavored. Upon consideration of the examinations and their facial adverse impact on minorities, and the testimony at the public hearings, the civil service commission was obligated to decline to certify the exams. This is perfectly legal, as the district court found. *See, e.g., Village of Arlington Heights v. Metro. Housing Dev. Corp.,* 429 U.S. 252 (1977) (black petitioners failed to prove that respondent was motivated by discriminatory purpose).

Hence, any burdens caused by New Haven's failure to certify the examinations, that fall on high-scoring examinees, are minimal at best – particularly in light of the questionable validity of the examinations themselves.

2. Narrow-tailoring Applies in this Circumstance.

a. Law-abiding cities cannot be forced into a Catch-22 between constitutional duties.

The venerable Judge Learned Hand once stated, "There is no surer way to misread any document than to read it literally[.]" *Guiseppi v. Walling*, 144 F.2d 608, 623-624 (2d Cir. 1944), concurring opinion. The over- or misinterpretation of the Equal Protection

Clause leads to paralysis of city administrations' attempts to diversify, as evidenced by the increasing number of reverse discrimination claims in by white first responders. It also has led to a decrease in actual diversity in fire service at the hands of many courts.

Yet, the Fourteenth Amendment and Equal Protection Clause, as well as Title VII, seek equal opportunity for all in public employment. However, for the *maintenance* of equality, it must first be realistically achieved.

Even today, this Court has recognized the "unhappy persistence of race discrimination" in this country, in *Adarand,* 515 U.S. at 237; *see, also, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1,* 127 S.Ct. 2738, 2791 (2007), Kennedy, J., concurring:

> [O]ur tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain. This is especially true when we seek assurance that opportunity is not denied on account of race. The enduring hope is that race should not matter; the reality is that too often it does. *** This is by way of preface to my respectful submission that parts of the opinion…imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account.

Unless interpreted properly, the Equal Protection Clause will put cities that attempt to follow the law in untenable positions. Cities are bound by numerous duties with respect to fire service. They have a compelling state interest in homeland security, which

includes diversity in rank, and ensuring new hires for unity and cohesiveness. Cities and fire administration, first and foremost, have the duty to use alternative measures in face of compelling interest. Moreover, such measures exist currently.

In this case, as revealed by the underlying record, New Haven exercised its lawful discretion to explore and use those alternative measures; indeed, not certifying the tests themselves was a form of a very limited alternative measure to reach the ultimate goal of employing a more accurate, less-discriminatory promotional process. Under Petitioners' logic, potentially *any* move a city makes to diminish adverse impact will take "race" into account in some fashion. Does this necessarily mean that it will run afoul of the Fourteenth Amendment? It cannot possibly mean so, without truly being "fatal in fact."

This clearly is not – and never was – the intent of the Equal Protection clause. See *Washington v. Davis,* 426 U.S. at 239 (requiring proof of intent); *Crawford,* 128 S.Ct. at 1626, concurrence of Justices Scalia, Thomas and Alito (neutral laws [or acts] are not invidious, even if some burden falls disproportionately on a protected class).

b. Neither recruiting nor "tutoring programs" for blacks is a reasonable or viable alternative measure.

Petitioners ironically claim there was no showing of "alternative measures" in this case, despite the fact that four days of hearings focused largely on testimony by experts discussing recent alternative measures available, as shown *supra.* Rather, Petitioners state

that the city could employ "tutor groups" for blacks, or make additional study materials available for incumbent black firefighters (many of whom have advanced degrees). However, such procedures are not equally valid alternatives to tests that consistently have an adverse impact on blacks and other minorities.

Nor are these procedures viable alternative measures for promotional candidates. Indeed, such relief would only reinforce the false stereotype put forth by Petitioners that blacks "just don't study" as hard as whites, or are otherwise intellectually lacking. They might also spawn more "politically correct" reverse-discrimination lawsuits by whites who don't have the same "tutor advantages." Most important, it would not solve the underlying problem: that written, job knowledge tests are inwardly flawed for this type of job and cannot adequately measure the intricacies of fire command. What is needed are alternative *measures* for promotion, not artificial pacifiers, such as "tutoring" that only reinforce the stereotypes held by an existing incumbent class

Likewise, future hiring recruitment strategies cannot solve the problem faced by New Haven and other cities in promotion. While recruiting efforts should be lauded and practiced by cities nationwide, they cannot address the disturbing lack of ranking officers in today's fire service. They can only assist in a distant future – and then, only if the avenues to promotion are not blocked, as they have been in the past and reflected in the present.

In sum, under the circumstances, the most narrowly tailored course of action in this situation is

not certifying examinations that show unjustified adverse impact of discrimination. Again, it is one-time, involves no racial classifications or preferences in promotion, and is necessary and justified in light of the compelling state interest of having a diverse local (and thus, national) fire service. The Equal Protection Clause is not sullied in this situation. New Haven's acts were narrowly tailored and appropriately limited under the circumstances.

CONCLUSION

Based on the foregoing reasons, *amici* most respectfully move this Court to affirm the judgments of the district court and the Second Circuit Court of Appeals.

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